

Evidence

by Marc T. Treadwell*

I. INTRODUCTION

During its 2005 session, the Georgia General Assembly passed legislation, commonly known as Senate Bill 3,¹ that will, if upheld by the courts, dramatically impact Georgia's civil justice system. Two provisions of Senate Bill 3 will change Georgia evidence law. The Official Code of Georgia Annotated ("O.C.G.A.") section 24-9-67.1(f),² discussed in more detail below, purports to adopt Federal Rule of Evidence 702,³ the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴ and create special rules for expert testimony in medical negligence actions. A new rule for the admission of mistake or error by medical providers⁵ is adopted by O.C.G.A. section 24-3-37.1, also discussed below.

The General Assembly also visited substantial changes on the criminal justice system by way of the Criminal Justice Act of 2005.⁶ Several provisions of the Act, now codified at O.C.G.A. sections 24-9-81,⁷ 24-9-84,⁸ and 24-9-84.1⁹ enacted new evidence rules that apply to both civil

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As lamented in previous surveys, Georgia does not have a comprehensive evidence code and the General Assembly long ago rejected efforts to adopt a form of the Federal Rules of Evidence. See, e.g., Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 214 (1992). This Article, however, will continue in the tradition of past Georgia Survey articles and will follow the organizational format of the Federal Rules of Evidence.

1. Ga. S. Bill 3, Reg. Sess. (2005).
2. O.C.G.A. § 24-9-67.1(f) (Supp. 2005).
3. FED. R. EVID. 702.
4. 509 U.S. 579 (1993).
5. O.C.G.A. § 24-3-37.1(c) (Supp. 2005).
6. Ga. H.R. Bill 170, Reg. Sess. (2005).
7. O.C.G.A. § 24-9-81 (1995 & Supp. 2005).
8. O.C.G.A. § 24-9-84 (1995 & Supp. 2005).

and criminal cases. As discussed in more detail below, these provisions change Georgia law with regard to impeaching witnesses.

Finally, the State Bar of Georgia again proposed that the General Assembly adopt, with some exceptions and variations, the Federal Rules of Evidence. As reported in a previous survey,¹⁰ the State Bar has, for over fifteen years, pushed the adoption of the Federal Rules of Evidence. The current version of the proposed rules can be found at the State Bar's website.¹¹

II. OBJECTIONS

Georgia recognizes the contemporaneous objection rule, which, as the name suggests, requires a party to object to evidence when it is tendered or run the risk of waiving the right to appeal the admission of the evidence.¹² The Georgia Supreme Court's decision in *Pearson v. State*¹³ addresses the interrelationship between the contemporaneous objection rule and the "continuing witness" rule, which prohibits jurors from reviewing written or recorded statements of witnesses during their deliberations.¹⁴

In *Pearson* the trial court admitted into evidence, without objection, a black bag that the defendant's victim was carrying when the defendant shot the victim. The defendant contended that he was acting in self-defense because he believed that the victim was reaching into the bag to retrieve a weapon. As it turned out, the bag only contained the victim's notebooks. After the close of evidence, the defendant objected to the contents of the bag being sent to the jury room. The defendant contended that the notebooks, which contained the defendant's written statements, were highly prejudicial and irrelevant.¹⁵

The supreme court held that if the basis of the defendant's objection was that the notebooks, although admissible, should not have been sent to the jury room, then he should have raised that objection when the notebooks were tendered.¹⁶ Although the defendant did not specifically base his objection on the continuing witness rule, the court, apparently

9. O.C.G.A. § 24-9-84.1 (1995 & Supp. 2005).

10. Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 175 (1989); see also Treadwell, 26 GA. ST. B.J. 149, 173 (1990).

11. State Bar of Georgia's Evidence Study Committee's Report, Proposed Ga. R. Evid., available at www.gabar.org/news/report_of_the_evidence_study_committee (June 6, 2005).

12. See *Sharpe v. Dep't of Transp.*, 267 Ga. 267, 476 S.E.2d 722 (1996).

13. 278 Ga. 490, 604 S.E.2d 180 (2004).

14. See *id.*; *Fields v. State*, 266 Ga. 241, 466 S.E.2d 202 (1996).

15. *Pearson*, 278 Ga. at 492, 604 S.E.2d at 183.

16. *Id.* at 492-93, 604 S.E.2d at 183.

thinking that that was really the defendant's point, held that the continuing witness rule applies only to written statements that, in effect, duplicate a witness's oral testimony or that serve as a substitute for oral testimony.¹⁷ Here, the notebooks were neither tendered as a substitute for nor a duplicate of the victim's testimony.¹⁸ Thus, a continuing witness objection, even had it been made, would not have been a valid objection.¹⁹

Motions in limine are invaluable tools for resolving evidentiary issues out of the presence of jurors. Little is accomplished by a successful objection to testimony when the jury has already heard the testimony. When used properly, motions in limine can exclude objectionable evidence out of the jury's presence. However, as discussed in previous surveys, motions in limine do not always relieve a party of the burden of making contemporaneous objections.²⁰

For example, in *F.D. Wilson Trucking Co. v. Ferneyhough*,²¹ the defendant made an all too common mistake. The defendant wisely moved in limine to exclude opinion testimony given by an investigating officer that the defendant's driver was following the plaintiff's vehicle too closely. At a pretrial conference, the court reserved ruling on the motion in limine. At trial, the defendant did not object to the officer's testimony. This, the court held, was a violation of the contemporaneous objection rule, and thus, the defendant waived the right to appeal that issue.²² The court of appeals reiterated that when a trial court reserves ruling on a motion in limine, the moving party must renew the objection at trial when the testimony is offered.²³

III. RELEVANCY

A. *Relevancy of Extrinsic Act Evidence*

In the years the Author has surveyed Georgia appellate decisions, determining the relevancy of extrinsic act evidence has been the most frequently addressed evidentiary issue. In recent years, however, the number of appeals concerning significant extrinsic act decisions has decreased. Perhaps this decrease demonstrates that the rules governing

17. *Id.*

18. *Id.*

19. *Id.*

20. See, e.g., Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 295, 296 (2001); Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 263, 264-65 (2000).

21. 269 Ga. App. 736, 605 S.E.2d 132 (2004).

22. *Id.* at 739, 605 S.E.2d at 135.

23. *Id.*

the admission of extrinsic act evidence have become sufficiently settled so that repeated adjustment and fine-tuning of those principles by appellate courts is unnecessary. Or perhaps it means that the use of extrinsic act evidence has become so pervasive that defense lawyers think it futile to appeal the admission of such evidence.

In any event, because appellate decisions discussing the principles governing the admission of extrinsic act evidence have decreased, a brief discussion of those principles is appropriate. "Extrinsic act evidence" refers to evidence of conduct, on occasions other than the occasion at issue, offered for substantive, as opposed to impeachment, purposes.²⁴ Such evidence is extrinsic to the act or transaction at issue. Generally, extrinsic act evidence is irrelevant, and thus, inadmissible.²⁵ However, like the rule against hearsay, the rule against extrinsic act evidence is known more for its exceptions than its flat prohibition.

Most commonly, evidence of totally different, but nonetheless similar, transactions "may be introduced to prove identity, motive, plan, scheme, bent of mind and course of conduct."²⁶ The admission of similar transaction evidence is governed by the procedural restrictions of Uniform Superior Court Rule 31.3.²⁷ Evidence of prior difficulties between the defendant and his victim, on the other hand, is not considered similar transaction evidence, and thus, is not subject to Rule 31.3.²⁸

Although the *res gestae* doctrine is typically thought of as an exception to the rule against hearsay, it also permits the admission of evidence that although not directly related to the transaction at issue, occurred at a time near enough to when that transaction occurred to be admitted as part of the "*res gestae*."²⁹ Like evidence of prior difficulties, *res gestae* evidence is not subject to Rule 31.³⁰

As noted, Rule 31 sets forth the procedural requirements for the admission of similar transaction evidence.³¹ In *Fulton v. State*,³² the defendant contended that the trial court violated Rule 31 when it admitted testimony of a witness who claimed that the defendant robbed him the night before the alleged victim was killed. Specifically, the

24. See O.C.G.A. § 24-2-2 (1995 & Supp. 2005); FED. R. EVID. 404.

25. O.C.G.A. § 24-2-2; see FED. R. EVID. 404.

26. *Franklin v. State*, 189 Ga. App. 405, 408, 376 S.E.2d 225, 228 (1988).

27. Ga. Sup. Ct. R. 31.3.

28. *McCrickard v. State*, 249 Ga. App. 715, 549 S.E.2d 505 (2001).

29. See, e.g., *Cooper v. State*, 188 Ga. App. 629, 373 S.E.2d 796 (1988); *Yarbrough v. State*, 186 Ga. App. 845, 368 S.E.2d 802 (1988).

30. See *id.*

31. Ga. Sup. Ct. R. 31.

32. 278 Ga. 58, 597 S.E.2d 396 (2004).

defendant contended that because the prosecution did not provide the ten-day pretrial notice required by Rule 31, the testimony should not have been admitted. The trial court, however, ruled that the incident of the previous night was part of the *res gestae*, which, as noted, is not subject to Rule 31.³³ This twenty-four hour gap between the charged offense and the unrelated assault made the *res gestae* doctrine a dubious basis for admitting the evidence. It was not surprising, then, that the supreme court looked for another reason to affirm the defendant's conviction.³⁴ The testimony, the supreme court reasoned, was offered to prove the defendant's motive for shooting the victim.³⁵ Apparently, the prosecution contended that the defendant thought the robbery victim asked the murder victim to kill the defendant in retaliation for the robbery. Thus, the defendant shot the murder victim because he thought the victim intended to kill him.³⁶ Evidence of motive, the court held, is admissible even though it may be based on a separate transaction, and "evidence of motive is not subject to the notice and hearing requirements of Uniform Superior Court Rules 31.1 and 31.3."³⁷ Accordingly, the supreme court affirmed the defendant's conviction.³⁸

In *Freeman v. State*,³⁹ the defendant also contended that the trial court violated Rule 31. This time, the defendant argued that the court violated Uniform Superior Court Rule 31.3 by not holding a pretrial hearing to determine the admissibility of similar transactions. The defendant, who was charged with sexually molesting his daughter, contended that a subsequent act of abuse was not admissible. The prosecution argued that the evidence was not similar transaction evidence, but evidence of other difficulties between the defendant and the victim. Because prior difficulty evidence is not subject to Rule 31, no pretrial hearing was required.⁴⁰

The court of appeals held that both the defendant and the prosecution were wrong.⁴¹ The evidence was neither similar transaction evidence nor prior difficulties evidence, but rather was evidence of a subsequent difficulty.⁴² The question, then, was whether evidence of subsequent

33. *Id.* at 60, 597 S.E.2d at 399.

34. *Id.*

35. *Id.*

36. *Id.* at 59, 597 S.E.2d at 398-99.

37. *Id.* (quoting *Fann v. State*, 275 Ga. 756, 757, 571 S.E.2d 774, 757 (2002)).

38. *Id.* at 65, 597 S.E.2d at 402.

39. 269 Ga. App. 435, 604 S.E.2d 280 (2004).

40. *Id.* at 436-38, 604 S.E.2d at 282-83.

41. *Id.* at 438, 604 S.E.2d at 284.

42. *Id.* at 437, 604 S.E.2d at 283.

difficulties, like evidence of prior difficulties, is not subject to Rule 31.⁴³ The court noted that this was an issue of first impression.⁴⁴ The court concluded that there was no material difference between prior and subsequent difficulties evidence.⁴⁵ Whether the difficulties occurred before or after the charged offense “does not alter the more important fact that this incident arose from the relationship between the defendant and the victim.”⁴⁶ Thus, the court held that the procedural requirements of Rule 31 did not apply to evidence of the subsequent difficulty between the defendant and his daughter.⁴⁷

Finally, in *Hill v. State*,⁴⁸ the court of appeals addressed the defendant’s attempt to rely on similar transaction evidence or, as the defendant put it, “reverse similar transaction” evidence.⁴⁹ In *Hill* the defendant attempted to adduce evidence of a strikingly similar robbery at the same Waffle House that the defendant was charged with robbing. The trial court refused to admit the evidence because the defendant could not prove who committed the other crime.⁵⁰ This, the court of appeals held, was not quite right.⁵¹ It was not necessary for the defendant to prove the identity of the person who committed the first robbery, but it was necessary for the defendant to offer some evidence that the same person committed the two robberies.⁵² Just as the state must prove, when offering similar transaction evidence, that the defendant committed the similar offense, a defendant, when offering “reverse similar transaction” evidence, must prove that the person, whoever that person may be, committed both the similar offense and the charged offense.⁵³

B. Rape Shield Statute

Georgia’s rape shield statute⁵⁴ proscribes the admission of evidence of a victim’s past sexual behavior in rape prosecutions.⁵⁵ Like other rape shield laws, Georgia’s statute embodies the policy that a victim’s

43. *Id.*

44. *Id.* at 437-38, 604 S.E.2d at 284.

45. *Id.*

46. *Id.* at 438, 604 S.E.2d at 284.

47. *Id.*

48. 271 Ga. App. 431, 609 S.E.2d 654 (2005).

49. *Id.* at 431, 609 S.E.2d at 655.

50. *Id.* at 433, 609 S.E.2d at 656-57.

51. *Id.* at 435, 609 S.E.2d at 657.

52. *Id.*

53. *Id.*

54. O.C.G.A. § 24-2-3 (1995 & Supp. 2005).

55. Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 175, 185 (1989).

prior sexual conduct, no matter how relevant in terms of general principles of relevancy, is not admissible.⁵⁶ By its terms, the statute applies only to rape cases.⁵⁷ However, for nearly twenty years, Georgia courts have explicitly or implicitly extended principles of the rape shield statute to prosecutions for other sexual offenses.⁵⁸ Thus, the supreme court's decision in *Abdulkadir v. State*⁵⁹ likely came as a surprise to prosecutors and criminal defense attorneys alike.

In *Abdulkadir* the court of appeals, in a decision discussed in last year's survey,⁶⁰ held that the trial court properly excluded evidence of a victim's sexually related behavior in the defendant's prosecution for rape, incest, and child molestation.⁶¹ In its opinion, the court of appeals noted, with no discussion, that courts had "consistently held that the rape shield statute applies to child molestation cases."⁶² The supreme court granted certiorari to address what seemed, at the time, to be the court of appeals' seemingly innocuous "ruling that the proscriptions set forth in Georgia's rape shield statute are applicable in prosecutions for child molestation."⁶³ The supreme court determined that the answer to this question was "clear."⁶⁴ The statute is expressly limited to "any prosecution for rape," and thus, can only be applied in rape prosecutions.⁶⁵ Nevertheless, the supreme court did not reverse the conviction.⁶⁶ The defendant was accused of rape, incest, and molestation.⁶⁷ Although he was acquitted of the rape charge, evidence of the victim's prior sexual behavior and experience was still not admissible because of the rape charge.⁶⁸ The supreme court rejected the defendant's argument that when a defendant who is charged with both rape and molestation is convicted only of molestation, that

60. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 242 (2004).

61. 264 Ga. App. 805, 592 S.E.2d 433 (2003).

62. *Id.* at 806, 592 S.E.2d at 435.

63. *Abdulkadir*, 279 Ga. at 122, 610 S.E.2d at 51.

64. *Id.* at 123, 610 S.E.2d at 53.

65. O.C.G.A. § 24-2-3(a) (1995 & Supp. 2005).

66. *Abdulkadir*, 279 Ga. at 125, 610 S.E.2d at 53.

67. *Abdulkadir*, 264 Ga. App. at 805, 592 S.E.2d at 434.

68. *Abdulkadir*, 279 Ga. at 125, 610 S.E.2d at 53.

69. *Id.*

70. 275 Ga. App. 281, 620 S.E.2d 394 (2005).

71. *Id.* at 290, 620 S.E.2d at 401.

defendant should get a new trial if evidence was excluded during his first trial pursuant to the rape shield statute.⁶⁹

The fallout from *Abdulkadir* was quick. In *Brown v. State*,⁷⁰ the defendant contended that the trial court erroneously excluded evidence that a similar transaction witness falsely accused the defendant of molesting him in an effort to cover-up the witness's homosexual relationship with another young male. The prosecution successfully moved "in limine to exclude the evidence based upon the rape shield statute."⁷¹ The court of appeals, however, relying on *Abdulkadir*, agreed with the defendant that the trial court erred in excluding the evidence because the rape shield statute applies only to prosecutions for rape.⁷²

The legislature, however, was also quick to react to *Abdulkadir*. On April 5, 2005, the General Assembly approved the Criminal Justice Act of 2005⁷³ that, among other things, made the rape shield statute again applicable to aggravated child abuse cases.⁷⁴ The statute, however, applies only to trials commencing on or after July 1, 2005.⁷⁵

C. Subsequent Remedial Measures

Georgia law, like the laws of most states and the Federal Rules of Evidence, bars the admission of evidence of subsequent remedial measures to prove negligence.⁷⁶ The rule represents a policy judgment that the admission of such evidence would discourage efforts to correct dangerous conditions or practices.⁷⁷ As demonstrated by the court of appeals decision in *Tyson v. Old Dominion Freight Line, Inc.*,⁷⁸ the rule does not create a privilege against the disclosure of evidence of subsequent remedial measures.⁷⁹ This distinction is important because

69. *Id.*

70. 275 Ga. App. 281, 620 S.E.2d 394 (2005).

71. *Id.* at 290, 620 S.E.2d at 401.

72. *Id.*

73. Ga. H.R. Bill 170, Reg. Sess. (2005); O.C.G.A. § 24-2-3 (Supp. 2005).

74. Ga. H.R. Bill 170, Reg. Sess. (2005); O.C.G.A. § 24-2-3.

75. Ga. H.R. Bill 170, Reg. Sess. (2005); O.C.G.A. § 24-2-3.

76. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 255 (2003). However, unlike Federal Rule of Evidence 407, the Georgia rule applies only to negligent actions, not to strict liability claims. *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 447 S.E.2d 302 (1994). FED. R. EVID. 407.

77. *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 881, 447 S.E.2d 302, 309 (1994) (quoting *Doster v. Central of Ga. R.R. Co.*, 177 Ga. App. 393, 396, 339 S.E.2d 619, 623 (1985)).

78. 270 Ga. App. 897, 608 S.E.2d 266 (2004).

79. *Id.* at 900, 608 S.E.2d at 269-70.

if evidence is privileged, it is not discoverable; if it is merely inadmissible, it is subject to discovery.⁸⁰

In *Tyson* the plaintiff, in his personal injury action against the defendant, sought to discover the defendant's internal investigations of the collision. The trial court, however, denied the plaintiff's motion to compel the production of this information. After a jury found in favor of the defendant, the plaintiff appealed and, among other things, contended that the trial court improperly denied him access to the defendant's investigative files. As a result, the plaintiff was entitled to a new trial.⁸¹ The court of appeals noted that the rule against the admission of evidence of subsequent remedial measures does not bar discovery of such evidence.⁸² In other words, the rule does not create a privilege. While the defendant may be able to block the discovery of such information by contending, for example, that the information was prepared in anticipation of litigation or for use at trial, the mere fact that the evidence involves subsequent remedial measures does not bar its discovery.⁸³ Moreover, the court held that the rule against the admission of evidence of subsequent remedial measures does not bar the admission of the evidence for some purpose other than showing negligence.⁸⁴ Therefore, the court remanded the case to the trial court to determine whether the disputed documents should have been admitted at trial and, if so, whether the failure to admit those documents required a new trial.⁸⁵

D. Miscellaneous Relevancy Issues

Previous surveys discussed the apparent changes in Georgia law concerning offers to pay injured parties' medical expenses.⁸⁶ Although the court of appeals has not flatly held that such offers are inadmissible as an admission of liability, it seems to have set the bar for the admission of such evidence so high that, as a practical matter, such evidence is rarely admissible. The court of appeals addressed a similar issue during the current survey period in *Trulove v. Jones*.⁸⁷

80. *Id.*

81. *Id.*

82. *Id.*, 608 S.E.2d at 270.

83. *Id.*

84. *Id.*, 608 S.E.2d at 269-70.

85. *Id.*, 608 S.E.2d at 270.

86. Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 279, 287 (1999); Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 337-39 (1996).

87. 271 Ga. App. 681, 610 S.E.2d 649 (2005).

In *Trulove* the plaintiff, a social guest of the defendant, fell off a partially constructed pool deck at the defendant's home. The trial court granted the defendant summary judgment, finding that the defendant breached no duty owed to the plaintiff. On appeal, the plaintiff contended that the defendant's admissions created a factual dispute regarding the defendant's liability, and thus, summary judgment was inappropriate. Specifically, the plaintiff noted that the defendant, in her deposition testimony, agreed that the incident was her fault.⁸⁸

The trial court held that the defendant's deposition testimony did not constitute an admission of liability, but "[was] merely [an] expression[] of benevolence or sympathy, and, as such, . . . did not create questions of fact that would preclude summary judgment."⁸⁹ The court of appeals affirmed, but not because the statements constituted expressions of benevolence or sympathy.⁹⁰ Rather, the court of appeals adopted the reasoning in *Widner v. Brookins, Inc.*,⁹¹ which relied on Judge Beasley's special concurrence in *Neubert v. Vigh*.⁹² The court held that even if the defendant admits fault, that admission cannot serve as a basis for liability if, as a matter of law, the defendant cannot be liable for the plaintiff's injuries.⁹³

In *Trulove* the plaintiff, because she was a licensee, could only recover from the defendant if the defendant's conduct was willful or wanton.⁹⁴ Because the undisputed facts showed an absence of willful or wanton conduct, the defendant could not be liable for the plaintiff's injuries no matter what admissions the defendant may have made.⁹⁵

As noted above, recently enacted O.C.G.A. section 24-3-37.1⁹⁶ adopts a special rule for admissions of mistake or error by medical providers. The statute provides that "any and all statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, *mistake, error*, or a general sense of benevolence . . . shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest."⁹⁷ Thus, the new statute goes far beyond the traditional rule that statements of sympathy or benevolence cannot be used as admis-

88. *Id.* at 681-83, 610 S.E.2d at 651-52.

89. *Id.* at 684, 610 S.E.2d at 653.

90. *Id.* at 685, 610 S.E.2d at 653.

91. 236 Ga. App. 563, 565-66, 512 S.E.2d 405, 407 (1999).

92. 218 Ga. App. 693, 695-96, 462 S.E.2d 808, 810-11 (1995) (Beasley, J., concurring).

93. *Trulove*, 271 Ga. App. at 685, 610 S.E.2d at 653.

94. *Id.* at 682, 610 S.E.2d at 652.

95. *Id.* at 683, 610 S.E.2d at 653.

96. O.C.G.A. § 24-3-37.1 (Supp. 2005).

97. *Id.* § 24-3-37.1(c) (emphasis added).

sions against interest. For certain healthcare providers, clear admissions of mistake and error are no longer admissible.

Federal Rule of Evidence 403 (“Rule 403”) provides that “relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”⁹⁸ Although Georgia’s statutory law does not contain a similar provision for exclusion of relevant evidence, Georgia courts have, as discussed in previous surveys, looked to the Rule 403 standard on occasion.⁹⁹ The Georgia Supreme Court did so again in *Ross v. State*.¹⁰⁰

In *Ross* the defendant, who was charged with possession of a weapon by a convicted felon, contended that the trial court should not have admitted evidence of the nature of his felony conviction. The felony conviction at issue was a conviction for enticing a minor for indecent purposes and the defendant understandably thought evidence regarding the nature of the conviction, as opposed to the mere fact that he was a convicted felon, would prejudice the jury in his firearms possession charge. Further, the defendant argued that it should be sufficient to inform the jury, as the defendant stipulated he would do, that he was a convicted felon.¹⁰¹ The supreme court agreed, adopting the holding of the United States Supreme Court in *Old Chief v. United States*.¹⁰²

In *Old Chief* the United States Supreme Court, relying on Rule 403, held that in a firearms possession case, it is error for the trial court to admit evidence of the nature of the defendant’s prior felony conviction upon which the firearm charge is based if that evidence would prejudice the jury.¹⁰³ The Georgia Supreme Court acknowledged that the state has a broad right to choose the evidence it wants to present to the jury and that “a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the [state] chooses to present it.”¹⁰⁴ However, in this very narrow circumstance, where the state simply needs to prove a person’s status as a convicted felon, there is no

98. FED. R. EVID. 403.

99. See Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 1219 (2004); Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 1487 (2003); Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 1399 (2002); Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 1165 (2000); Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 1019 (1999); Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 1027 (1998); Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323 (1996).

100. 279 Ga. 365, 614 S.E.2d 31 (2005).

101. *Id.* at 367, 614 S.E.2d at 32-33.

102. 519 U.S. 172 (1997); *Ross*, 279 Ga. at 368, 614 S.E.2d at 34.

103. *Old Chief*, 519 U.S. at 191-92.

104. *Ross*, 279 Ga. at 367, 614 S.E.2d at 34 (quoting *Old Chief*, 519 U.S. at 186).

need for the jury to know the nature of the felony conviction.¹⁰⁵ The court, however, held that in view of the overwhelming evidence of the defendant's guilt, it was probable that the improper admission of the evidence did not contribute to the verdict, and therefore, was harmless.¹⁰⁶

IV. PRIVILEGES

During the current survey period, the supreme court reaffirmed Georgia's strong protection against disclosure of communications between a patient and a psychologist. In *State v. Herendeen*,¹⁰⁷ two psychologists moved to quash a grand jury subpoena seeking the production of the psychologists' records concerning two children who had been removed from their parents' custody after their father was indicted on charges of child molestation and their mother had been indicted for her alleged failure to stop the molestation.¹⁰⁸

While in custody, the children received counseling from the psychologists at the direction of the juvenile court. Also, the mother and one of the children attended joint therapy sessions with one of the psychologists. The trial court refused to quash the subpoena because the counseling "was done pursuant to court order with express contemplation of recommendations to the court based upon that therapy."¹⁰⁹ The trial court concluded that the privilege could only be invoked when a patient voluntarily sought treatment.¹¹⁰

On appeal, the court held that the existence of a psychologist-patient relationship did not turn on whether the patient sought treatment voluntarily, but on whether treatment was given or contemplated. The court also held, however, that the privilege did not extend to records that were not prepared in the course of treatment or did not include communications between the patient and the psychologist. Thus, an in camera inspection was appropriate to determine whether the privilege applied to particular documents.¹¹¹

The supreme court granted certiorari and affirmed.¹¹² In a historical examination of Georgia's psychologist-patient privilege, the court noted that since 1951 Georgia has protected communications between a

105. *Id.* at 368, 614 S.E.2d at 34.

106. *Id.*

107. 279 Ga. 323, 613 S.E.2d 647 (2005).

108. *Id.* at 324, 613 S.E.2d at 648-49.

109. *Id.*, 613 S.E.2d at 649.

110. *Id.*

111. *Id.*

112. *Id.* at 324, 328, 613 S.E.2d at 651.

psychologist and a patient.¹¹³ In 1995 the General Assembly extended protection to confidential communications between patients and licensed clinical social workers, clinical mental health nurse specialists, marriage and family therapists, and licensed professional counselors.¹¹⁴ Because the privilege now extends beyond communications between psychologists and patients, the court felt it appropriate to refer to the privilege as the “mental health privilege.”¹¹⁵

The mental health privilege applies once “the requisite relationship [between the mental health provider] and patient [is established], to the extent that treatment was given or contemplated.”¹¹⁶ Thus, the privilege does not exist when a mental health provider is appointed by a court to evaluate a person’s mental health because no treatment is given or contemplated.¹¹⁷ Similarly, the privilege does not apply when a court orders the plaintiff in a civil action to undergo a psychiatric examination or when parents, as part of a parental rights termination action, are ordered to undergo a mental evaluation.¹¹⁸ Again, though, the key is not whether an individual is ordered to be evaluated, but whether treatment is given or contemplated.¹¹⁹

In *Herendeen* treatment was provided, and thus, the fact that the relationship commenced as a result of the court order did not preclude the application of the mental health privilege.¹²⁰ Thus, the court of appeals correctly held that any communication between the doctors and their patients would not be subject to production.¹²¹

V. WITNESSES

A. *Impeachment*

The Criminal Justice Act of 2005¹²² made two significant changes with regard to rules governing impeachment of witnesses. Georgia statutory law has long barred a party from impeaching his own witness unless “he can show to the court that he has been entrapped by said

113. *Id.* at 324, 613 S.E.2d at 649.

114. *Id.* at 325, 613 S.E.2d at 649; O.C.G.A. § 24-9-21 (1995).

115. *Herendeen*, 279 Ga. at 325, 613 S.E.2d at 649.

116. *Id.* at 326, 613 S.E.2d at 650 (quoting *Massey v. State*, 226 Ga. 703, 704, 177 S.E.2d 79, 81 (1970)).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 328, 613 S.E.2d at 651.

121. *Id.*

122. Ga. H.R. Bill 170, Reg. Sess. (2005).

witness by a previous contradictory statement.”¹²³ As discussed in a previous survey,¹²⁴ case law has largely eroded the entrapment requirement, and it is no longer necessary that a party be surprised by the testimony of his witness in order to impeach him. However, the Criminal Justice Act of 2005 eliminates any requirement of surprise and essentially adopts Federal Rule of Evidence 607.¹²⁵

Prior to July 1, 2005, Georgia law permitted the use of evidence of general bad character to impeach a witness.¹²⁶ New O.C.G.A. section 24-9-84 changes that rule and largely tracks Federal Rule of Evidence 608 (“Rule 608”). Now, evidence of a witness’s bad character is admissible only if the evidence refers to the witness’s character for truthfulness or untruthfulness. Further, such character evidence is admissible only after the “character of the witness for truthfulness has been attacked by reputation evidence or otherwise.”¹²⁷

New O.C.G.A. section 24-9-84 does not adopt verbatim section (b) of Rule 608, which generally prohibits the use of specific instances of conduct to attack or bolster a witness’s character for truthfulness. Rather, new section 24-9-84 retains prior law and provides that the “particular transactions or the opinions of single individuals shall not be inquired of on either side, except upon cross-examination in seeking for the extent and foundation of the witness’s knowledge.”¹²⁸

In a survey article written over ten years ago, the author noted that Georgia law governing the use of convictions to impeach a witness was in a “near hopeless state of confusion . . . partly due to the remarkable fact that the Georgia Evidence Code fails to address the use of convictions for impeachment purposes.”¹²⁹ The Criminal Justice Act of 2005 changed that as well.

New O.C.G.A. section 24-9-84.1 largely, but not completely, adopts Federal Rule of Evidence 609 (“Rule 609”) regarding the use of convictions. Under the new law, a witness, other than a criminal defendant, can be impeached with evidence of a conviction punishable by death or imprisonment of one year or more, essentially a felony, if the “probative value of admitting the evidence outweighs its prejudicial effect to the witness.”¹³⁰ A criminal defendant can be impeached with evidence of

123. O.C.G.A. § 24-9-81 (1995).

124. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 256 (2003).

125. O.C.G.A. § 24-9-81 (2005). Compare FED. R. EVID. 607.

126. O.C.G.A. § 24-9-84 (1995). Compare FED. R. EVID. 608.

127. O.C.G.A. § 24-9-84 (2005).

128. *Id.*

129. Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 233, 248 (1994).

130. O.C.G.A. § 24-9-84.1(a)(1) (Supp. 2005).

such a crime only if the probative value of the conviction “substantially outweighs its prejudicial effect to the defendant.”¹³¹ Any witness can be impeached with evidence of conviction of a crime involving “dishonestly or false statement.”¹³²

Prior Georgia law was similar. A witness could be impeached by evidence of a conviction of a felony or of a misdemeanor involving moral turpitude.¹³³ However, prior Georgia law did not require a weighing of the probative value and prejudicial effect of the conviction.

O.C.G.A. section 24-9-84.1(b), like Rule 608, prohibits the use of a conviction that is more than ten years old unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.¹³⁴ This, too, changed Georgia law, which had no such limitation.

Subsection (c) of new O.C.G.A. section 24-9-84.1 provides that under certain circumstances, convictions that have been the subject of a pardon are not admissible.¹³⁵ Subsection (d) of new O.C.G.A. section 24-9-84.1 addresses juvenile adjudications and differs somewhat from Rule 608(d).¹³⁶ Under the new Georgia law, a juvenile court adjudication of delinquency is not admissible against a defendant in a criminal case, and an adjudication of delinquency is presumptively inadmissible against other witnesses in a criminal case, but that presumption can be rebutted.¹³⁷

Finally, subsection (e) of new O.C.G.A. section 24-9-84.1, which is identical to Rule 609(e), provides that the pendency of an appeal does not render a conviction inadmissible. However, evidence of the appeal is also admissible.¹³⁸

Interestingly, the new rule is silent on one of the key differences between prior Georgia law and Rule 609. Under Rule 609, a conviction can be proved by cross-examination of the witness.¹³⁹ Under prior Georgia law, the only way to prove a conviction was by tendering a

131. *Id.* § 24-9-84.1(2)

132. *Id.* § 24-9-84.1(a)(3).

133. *Mullins v. Thompson*, 274 Ga. 366, 553 S.E.2d 154 (2001).

134. O.C.G.A. § 24-9-84.1(b) (Supp. 2005). *Compare* FED. R. EVID. 608.

135. O.C.G.A. § 24-9-84.1(c) (Supp. 2005).

136. *Id.* § 24-9-84.1(d).

137. *Id.*

138. *Id.* § 24-9-84.1(e).

139. *See* FED. R. EVID. 609.

certified copy of the conviction.¹⁴⁰ Apparently, the courts will have to decide whether prior Georgia law survived the Criminal Justice Act.

The new statute is also silent on the question of whether a witness's credibility can be impeached with evidence of a First Offender Act conviction.¹⁴¹ This is somewhat surprising given that Georgia courts have struggled with this issue.¹⁴² Perhaps this means that existing law still applies, and thus, First Offender Act convictions cannot be used to impeach a witness's character for truthfulness.

B. *Prior Statements*

Georgia has two rather unusual rules regarding the admissibility of prior statements by witnesses. First, in *Gibbons v. State*,¹⁴³ the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination.¹⁴⁴ Second, pursuant to *Cuzzort v. State*,¹⁴⁵ a prior consistent statement is admissible as substantive evidence if the witness is present at trial and subject to cross-examination.¹⁴⁶ However, the supreme court significantly weakened *Cuzzort* in *Woodard v. State*,¹⁴⁷ when it held that prior consistent statements should be admitted only when the veracity of the witness who made the statement has been placed at issue.¹⁴⁸

In *Jackson v. State*,¹⁴⁹ a prosecution witness testified favorably to the prosecution on direct examination. On cross-examination, the defendant's attorney established that the witness hoped that his favorable testimony would result in his early release from prison. Before the witness even testified, however, a police officer testified regarding that witness's prior statements implicating the defendant. The police officer's testimony was consistent with that witness's later trial testimony.¹⁵⁰

140. *Smith v. State*, 276 Ga. 263, 364, 577 S.E.2d 548, 549 (2003) (citing *Matthews v. State*, 268 Ga. 798, 801, 493 S.E.2d 137, 140 (1997)); see also Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 257, 270 (1991).

141. O.C.G.A. §§ 42-8-60 to -65 (1997).

142. Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 229, 240 (1998) (discussing *Witcher v. Pender*, 260 Ga. 248, 392 S.E.2d 6 (1990); *Matthews v. State*, 268 Ga. 798, 493 S.E.2d 136 (1997)).

143. 248 Ga. 858, 286 S.E.2d 717 (1982).

144. *Id.* at 862, 286 S.E.2d at 721.

145. 254 Ga. 745, 334 S.E.2d 661 (1985).

146. *Id.* at 745, 334 S.E.2d at 662.

147. 269 Ga. 317, 496 S.E.2d 896 (1998).

148. *Id.* at 320, 496 S.E.2d at 899. *Woodard* still requires that the witness be present for trial and available for cross-examination. *Id.*

149. 271 Ga. App. 278, 609 S.E.2d 207 (2005).

150. *Id.* at 282, 609 S.E.2d at 210-11.

The court of appeals affirmed the defendant's conviction.¹⁵¹ Although the witness's credibility had not yet been attacked when the officer testified about the witness's prior consistent statement, his credibility was eventually attacked, which rendered the prior consistent statement admissible.¹⁵² Ironically, it seems that the defendant would have been better off had he not questioned the witness at all.

The court of appeals was a little more stringent in applying the requirement that a witness's credibility be attacked in *Davis v. Reid*.¹⁵³ In *Davis*, a medical negligence action, the plaintiff contended that the defendant negligently failed to diagnose her breast cancer. The plaintiff died prior to trial, but her testimony was taken prior to her death. According to the court, during that deposition, the defendant did not directly attack the plaintiff's testimony that she showed the defendant a lump on her breast on a certain date, a critical factual dispute at the subsequent trial. Afterwards, the defendant vehemently denied that the patient showed him the lump.¹⁵⁴

At trial, the attorneys for the plaintiff attempted to introduce testimony from the plaintiff's brother and a friend that the plaintiff told them she showed the defendant the lump on her breast during that visit. The plaintiff's attorneys argued that this testimony was admissible as the plaintiff's prior consistent statement.¹⁵⁵ The court of appeals, citing *Woodard*, disagreed.¹⁵⁶ Although the defendant's evidence sharply contradicted the evidence that the plaintiff told the defendant about the lump, the court held that the defendant never attacked the plaintiff's testimony stating the defendant told the plaintiff not to worry about the lump.¹⁵⁷ Moreover, the defendant never suggested that the patient recently fabricated her version of the encounter.¹⁵⁸

C. Refreshing Recollection

The court of appeals decision in *Hall v. State*¹⁵⁹ illustrates that O.C.G.A. section 24-9-69, which allows a witness to refresh his recollection from "any written instrument or memorandum,"¹⁶⁰ is not a vehicle

151. *Id.* at 283, 609 S.E.2d at 211.

152. *Id.* at 282, 609 S.E.2d at 211.

153. 272 Ga. App. 312, 612 S.E.2d 112 (2005).

154. *Id.* at 312-14, 612 S.E.2d at 114-15.

155. *Id.* at 316, 612 S.E.2d at 116.

156. *Id.*

157. *Id.*, 612 S.E.2d at 117.

158. *Id.*

159. 272 Ga. App. 204, 612 S.E.2d 44 (2005).

160. O.C.G.A. § 24-9-69 (1995).

for the admission of the document.¹⁶¹ Rather, the function of the document is to refresh the witness's recollection.¹⁶²

In *Hall* the defendant, during her trial for fatally stabbing her boyfriend, contended that she acted in self-defense. In support of this defense, she testified about an incident during which her boyfriend hit her on the head with a beer bottle. On cross-examination, the defendant testified that she did not press charges because she received no further contact from law enforcement officials about prosecuting her boyfriend. The prosecutor then showed the defendant copies of two letters from the Richmond County Sheriff's Office and asked if they refreshed her recollection. She denied that she had seen the letters. The prosecutor then commenced to read from the letters, including portions that provided information about contacting the sheriff's office for assistance.¹⁶³

The court of appeals agreed that the trial court improperly allowed the prosecutor to read from the letters after the defendant denied that they refreshed her recollection.¹⁶⁴ Clearly, the prosecutor was attempting to show that the defendant had, in fact, been contacted about prosecuting her boyfriend for the assault. However, because the record did not refresh the defendant's recollection, it was improper to allow the prosecutor to read the letters to the jury.¹⁶⁵

VI. EXPERT WITNESSES

For years, Georgia's appellate courts have stubbornly resisted pleas for the judicial adoption of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁶⁶ Clearly, many believe that the United States Supreme Court's decision in *Daubert* assigning district judges the role of gatekeeper to keep "junk science" out of the courtroom and the subsequent codification of *Daubert* in the Federal Rules of Evidence¹⁶⁷ were positive developments. Just as clearly, however, whatever good has come of *Daubert* has come at great cost. Federal district courts conduct days-long *Daubert* hearings, and appellate courts render lengthy and sometimes conflicting opinions trying to define the proper gatekeeping role for district judges.

161. 272 Ga. App. at 208, 612 S.E.2d at 47.

162. *Id.*

163. *Id.* at 204-07, 612 S.E.2d at 44-47.

164. *Id.* at 208, 612 S.E.2d at 47.

165. *Id.*

166. 509 U.S. 579 (1993). See, e.g., Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 259-63 (2003).

167. FED. R. EVID. 702.

Given the relatively limited resources of Georgia's trial courts, the resistance of Georgia's judiciary to *Daubert* has been understandable.

In 2005, however, as a part of "tort reform" legislation, the insurance industry and other special interest groups finally got what they wanted—the legislative adoption of *Daubert*.¹⁶⁸ Ironically, because of the resistance of the prosecutor lobby, the new *Daubert* statute applies only to civil cases.¹⁶⁹ Expert testimony in criminal cases will continue to be governed by O.C.G.A. section 24-9-67¹⁷⁰ and *Harper v. State*.¹⁷¹ Apparently, junk science is acceptable in criminal cases.

Although it tracks Federal Rule of Evidence 702 for the most part, O.C.G.A. section 24-9-67.1, like much of the tort reform legislation enacted by the General Assembly in 2005, creates special rules for medical negligence actions.¹⁷² First, in professional negligence actions, an expert may testify regarding the standard of care only if, at the time of the alleged negligence, the expert was licensed.¹⁷³ In the case of medical negligence actions, the expert must have been licensed and must have possessed requisite knowledge, as defined in the statute, of the subject matter on which he is testifying.¹⁷⁴ Procedurally, the new statute allows for the court to convene a pretrial hearing, i.e., a *Daubert* hearing, to determine the admissibility of an expert's proposed testimony.¹⁷⁵

At the time of publication, there were no appellate decisions interpreting the new O.C.G.A. section 24-9-67.1. At least two trial courts have refused to apply the statute to cases on the eve of or near trial,¹⁷⁶ basically, because it would be unfair to change the rules at such late stages. On a more substantive level, litigants have attacked the constitutionality of the statute for various reasons. Perhaps by next year's survey, the supreme court will have weighed in on the matter.

The court of appeals decision in *Home Depot U.S.A., Inc. v. Tvrdeich*¹⁷⁷ provides an excellent illustration of pre-O.C.G.A. section 24-9-67.1 analysis of expert testimony in a civil case. In *Home Depot* the plaintiff contended that she suffered from systemic scleroderma, an

168. See O.C.G.A. § 24-9-67.1 (Supp. 2005).

169. *Id.* § 24-9-67.1(2).

170. *Id.* § 24-9-67.

171. 249 Ga. 519, 292 S.E.2d 389 (1982).

172. See O.C.G.A. § 24-9-67.1; FED. R. EVID. 702.

173. O.C.G.A. § 24-9-67.1(a). This particular provision applies to all professional negligence actions, not just medical negligence actions. *Id.* § 24-9-67.1(c)(1).

174. *Id.* § 24-9-67.1(c)(2).

175. *Id.* § 24-9-67.1(d).

176. Trial court decisions in Georgia are not reported.

177. 268 Ga. App. 579, 602 S.E.2d 297 (2004).

autoimmune connective tissue disorder, caused by an injury she suffered while shopping at the defendant's store. The defendant contended that the trial court erroneously admitted expert testimony that the trauma of the plaintiff's fall eventually caused her systemic scleroderma. Specifically, the defendant argued that the testimony was based upon a theory that had not yet reached a "scientific stage of verifiable certainty" as required by the *Harper* test.¹⁷⁸

The plaintiff contended that *Harper* was not applicable because her experts did not base their opinions on the results of scientific techniques or procedures, but rather based their opinions on the facts, the evidence, and their experience in their fields of expertise.¹⁷⁹ The court of appeals agreed, stating that "[b]ecause Tvrdeich's experts drew their conclusions from testimony and evidence in the record, rather than from any scientific test or technique, we hold the trial court did not err in declining to apply the *Harper v. State* standard to their testimony."¹⁸⁰

If, in fact, Georgia courts adhere to the rigid *Daubert* analysis applied in federal courts, there will be no more decisions like *Home Depot*, a point that can be illustrated by taking a look at a recent Eleventh Circuit decision. In *McDowell v. Brown*,¹⁸¹ the plaintiff, a former inmate at a DeKalb County jail, brought a medical negligence claim against a contractor providing medical services at the jail. The plaintiff claimed that he had been permanently injured by the defendant's failure to timely refer him for treatment of a spinal abscess. Specifically, the plaintiff contended that the defendant's nurses, along with other medical care providers (who had settled with the plaintiff), did not timely react to the plaintiff's symptoms, which resulted in an inordinate delay in surgery for his spinal abscess. Regarding the claim based on the defendant's nurses' negligence, the district court granted summary judgment for the defendant on the grounds that the plaintiff's experts, because they were physicians and not nurses, were not competent to testify regarding the nursing standard of care.¹⁸²

On appeal from the grant of summary judgment, the Eleventh Circuit held that the district court erred when it ruled that the plaintiff's expert physicians were not competent to testify regarding the standard of care

178. *Id.* at 579-81, 602 S.E.2d at 299-300; *Harper v. State*, 249 Ga. 519, 525, 292 S.E.2d 389, 395 (1982). Prior to the adoption of O.C.G.A. section 24-9-67.1, *Harper* governed the admissibility of expert testimony in Georgia. It still applies in criminal cases.

179. *Home Depot U.S.A.*, 268 Ga. App. at 581, 602 S.E.2d at 300.

180. *Id.* at 583, 602 S.E.2d at 301.

181. 392 F.3d 1283 (11th Cir. 2004).

182. *Id.* at 1286-89.

that should have been exercised by the defendant's nurses.¹⁸³ The Eleventh Circuit reasoned that pursuant to Federal Rule of Evidence 601,¹⁸⁴ Georgia law provided the rule of decision regarding competency issues, which clearly provides that physicians can testify to the standard of care for nurses.¹⁸⁵

Unfortunately for the plaintiff, however, the Eleventh Circuit did not stop there. Even though the district court found that the plaintiff's experts were "qualified to testify as to the issue of causation, i.e., the nature of the spinal epidural abscess and McDowell's resulting paralysis,"¹⁸⁶ the Eleventh Circuit proceeded to address that issue.¹⁸⁷

The court then turned to the question of whether the experts' causation testimony met *Daubert's* reliability requirement.¹⁸⁸ Essentially, each of the plaintiff's experts testified that the delay in treating the spinal abscess worsened the plaintiff's condition.¹⁸⁹ The Eleventh Circuit held that this testimony was not reliable because the experts could not cite scientific studies supporting, to the satisfaction of the Eleventh Circuit, their causation opinions.¹⁹⁰ For example, one expert relied on a study addressing delays of forty-eight hours in treatment.¹⁹¹ Because the delay in the plaintiff's treatment was twenty-four hours, relying on this study "runs afoul of [the *Allison v. McGhan Med. Corp.*] admonition that a theory should not 'leap' from an accepted scientific premise to an unsupported one."¹⁹² Additionally, the Eleventh Circuit noted that the expert had "not tested his own theory nor determined any error rate associated with it."¹⁹³

183. *Id.* at 1301.

184. FED. R. EVID. 601.

185. *McDowell*, 392 F.3d at 1296; see *Howard v. City of Columbus*, 219 Ga. App. 569, 573, 574-75, 466 S.E.2d 51, 55-56 (1995).

186. *McDowell*, 392 F.3d at 1298.

187. There is no indication in the record that any party appealed the district court's determination that the plaintiff's experts could properly testify regarding causation and the record is not clear regarding the context of that ruling. Although not entirely clear from the opinion, apparently the district court did not expressly reach the issue of causation regarding the defendant's nurses but it did rule, in response to motions filed by the settling defendants, that the plaintiff's experts' causation testimony did not satisfy *Daubert*. *Id.* at 1298-1301.

188. *Id.* at 1298.

189. *Id.* at 1299-1301.

190. *Id.* at 1301-02.

191. *Id.* at 1299.

192. *Id.* at 1300; see *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1314 (11th Cir. 1999).

193. *McDowell*, 392 F.3d at 1300.

In short, the Eleventh Circuit held that the plaintiff “offered no reliable evidence that earlier medical intervention would have prevented or diminished his injury.”¹⁹⁴ The Eleventh Circuit did not address how the plaintiff could have obtained scientific studies demonstrating that delay in the treatment of a spinal cord abscess can cause injury, additional injury, or increased disability.¹⁹⁵ It seems clear that no ethical physician would withhold treatment to a patient suffering from a spinal abscess in order to gage the impact of delayed medical care.

Because of the new dual standard for the admissibility of expert witness testimony, the *Harper* test will still be applied in criminal cases, and several decisions rendered during this survey period are noteworthy in that regard.

In *Grinstead v. State*,¹⁹⁶ the defendant contended that the trial court abused its discretion when it admitted the results of an “unproven” test to prove that the defendant had used drugs. The defendant’s probation officer used a Roche Systems “On Track” drug test to test the defendant for drug usage. On cross-examination, the officer acknowledged that he did not have the expertise to testify about the accuracy of the test, and he could not say whether prescription or other legal drugs could cause a false positive for illegal drugs. The issue on appeal was whether the On Track test satisfied *Harper v. State*.¹⁹⁷

Under *Harper*, the court noted, it is permissible for a trial judge to determine whether a scientific procedure or technique has reached a scientific stage of verifiable certainty, and it is not necessary for the judge to receive evidence to establish that reliability.¹⁹⁸ Rather, the court can base its determination on literature or decisions of cases from other jurisdictions addressing the reliability of the test.¹⁹⁹ If the court relies on other cases, however, there must be a significant number of cases holding the test or procedure reliable.²⁰⁰ Here, the trial court relied on only one case, *Cheatwood v. State*,²⁰¹ however, it was not clear that the test addressed in *Cheatwood* was the same test used on the defendant.²⁰² In *Cheatwood* the test was used to determine the presence of marijuana and cocaine, not morphine and methamphet-

194. *Id.* at 1302.

195. *See id.*

196. 269 Ga. App. 820, 605 S.E.2d 417 (2004).

197. *Id.* at 820-21, 605 S.E.2d at 419.

198. *Id.* at 821-22, 605 S.E.2d at 419.

199. *Id.* at 822, 605 S.E.2d at 419.

200. *Id.*

201. 248 Ga. App. 617, 548 S.E.2d 384 (2001).

202. *Grinstead*, 269 Ga. App. at 822-23, 605 S.E.2d at 419-20.

amine, the drugs allegedly found in the defendant's system.²⁰³ In short, there was insufficient evidence to establish the scientific reliability of the On Track test, and thus, the trial court erred in admitting the test results.²⁰⁴

In *Riley v. State*,²⁰⁵ the defendant attempted to establish, through the testimony of a psychologist, that the defendant falsely confessed to setting fire to his son's bed while his son was sleeping. The psychologist developed what he called a "false confession theory."²⁰⁶ In a pretrial hearing to determine the admissibility of the psychologist's testimony, the psychologist testified that his knowledge of the false confession theory was based upon his recent reading of five articles. Most importantly, when asked if the false confession theory had reached a verifiable stage of scientific certainty, he said, "I don't think it's going to reach a verifiable study stage of scientific certainty until a number of years go by and we know more, do more research."²⁰⁷ In view of that, the supreme court had little difficulty concluding that the false confession theory did not satisfy the *Harper* test.²⁰⁸

If the scientific principle or technique is sufficiently reliable under *Harper*, the next inquiry is whether the person performing the test "substantially performed the scientific procedures in an acceptable manner."²⁰⁹ In *State v. Tousley*,²¹⁰ a DUI case, the trial court excluded the results of a horizontal gaze nystagmus test ("HGN test") performed on the defendant by the arresting officer. Police officers use this test, which is based upon eye movements, as a field sobriety test.²¹¹

As noted in a previous survey,²¹² the court of appeals held that the HGN test reached the requisite stage of verifiable certainty.²¹³ In *Tousley*, however, the trial court held that the officer improperly administered the test. The officer acknowledged that he did not perform the HGN test exactly as he had been instructed because he did not ask the defendant if she wore contacts or eyeglasses. Further, one component of the test requires that a stimulus be held at a particular point for

203. *Id.* at 823, 605 S.E.2d at 419-20.

204. *Id.* at 822-23, 605 S.E.2d at 419-20.

205. 278 Ga. 677, 604 S.E.2d 488 (2004).

206. *Id.* at 681, 604 S.E.2d at 494.

207. *Id.* at 682, 604 S.E.2d at 495.

208. *Id.*

209. *Johnson v. State*, 264 Ga. 456, 458, 448 S.E.2d 177, 179 (1994).

210. 271 Ga. App. 874, 611 S.E.2d 139 (2005).

211. *Id.* at 879-80, 611 S.E.2d at 144-45.

212. Marc T. Treadwell, *Evidence*, 45 MERCER L. REV. 229, 243 (1993).

213. *Manley v. State*, 206 Ga. App. 281, 282, 424 S.E.2d 818, 819-20 (1992).

at least four seconds. The trial court concluded that the stimulus was not held in a stationary position for a total of four seconds in every instance. Because the officer did not “keep[] [the stimulus] out long enough,” the trial court excluded evidence of the test.²¹⁴

On appeal, the court held that the question was one of degree.²¹⁵ If the expert substantially departs from accepted principles or procedures, then the test results may be unreliable, and thus, inadmissible.²¹⁶ Otherwise, the departure would affect the weight of the expert’s testimony, not its admissibility.²¹⁷ The court noted that the trial court found fault with only one aspect of the test, an aspect that accounted for two of the six possible clues of intoxication.²¹⁸ The trial court did not find any error regarding the remaining components of the HGN test, which accounted for four clues of intoxication.²¹⁹ The court noted that law enforcement guidelines provide that a score of four out of six clues is sufficient to constitute evidence of impairment.²²⁰ Noting that the evidence established that the officer had been properly trained and was substantially experienced in administering the test, and that he properly administered the test with regard to four of the clues he found, the court held that the record did not support a finding that the officer failed to substantially comply with applicable law enforcement guidelines.²²¹ Therefore, the trial court erroneously excluded the results of the HGN test.²²²

In numerous survey articles written by the author since 1988, the author attempted to analyze dozens of cases in which the courts struggled with the question of whether expert testimony is admissible to prove or disprove that a child was sexually abused. Because this struggle emanated from two apparently conflicting supreme court decisions, *State v. Butler*²²³ and *Allison v. State*,²²⁴ the author referred to this struggle as the Butler-Allison debate.

In *Butler* the supreme court, with three justices dissenting, held that an expert could testify that a child had been sexually molested.²²⁵ The

214. *Tousley*, 271 Ga. App. at 876, 611 S.E.2d at 142.

215. *Id.* at 879, 611 S.E.2d at 144.

216. *Id.* at 880, 611 S.E.2d at 144.

217. *Id.*, 611 S.E.2d at 145.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*, 611 S.E.2d at 145-46.

222. *Id.*, 611 S.E.2d at 146.

223. 256 Ga. 448, 349 S.E.2d 684 (1986).

224. 256 Ga. 851, 353 S.E.2d 805 (1987).

225. 256 Ga. at 449-50, 349 S.E.2d at 685-86.

dissent argued that such testimony is merely a prosecutorial mechanism to bolster the child's credibility and that it completely usurped the function of the jury.²²⁶

In *Allison*, on the other hand, the supreme court held that a psychologist could not testify that an alleged molestation victim had been sexually abused.²²⁷ Specifically, the court held that while a psychologist could testify as to the "lineaments" of the child abuse syndrome, he could not testify regarding whether the child suffered abuse because this was a question the jury was capable of answering on its own.²²⁸

In *Atkins v. State*,²²⁹ a six-judge panel of the court of appeals addressed the defendant's contention that a pediatrician improperly testified that the victim's medical history was "consistent" with the medical history the pediatrician would expect from a victim of molestation.²³⁰ The court acknowledged the apparent contradiction between *Butler* and *Allison*.²³¹ In *Butler* the supreme court "established a very broad view regarding the admissibility of a pediatrician's opinion that a child had *actually* been abused based on a physical examination and medical history."²³² However, in *Allison* the supreme court "appeared to restrict the broad admissibility of an expert's conclusion that molestation *actually* occurred."²³³ Relying on *Allison*, the court in *Atkins* stated that an expert cannot testify that abuse actually took place if there is no tangible physical evidence of the abuse, but the expert can testify that the victim's symptoms are consistent with a determination that the victim is suffering from an abuse syndrome.²³⁴

Then, in *Harris v. State*,²³⁵ the supreme court, although not expressly overruling *Butler*, held that a pediatrician may not testify that an act of abuse actually occurred even if the testimony is based upon a physical examination.²³⁶ Relying on the dissenting opinions in *Harris*, however, the court of appeals in *Atkins* noted that an expert may testify that findings are consistent with an act of molestation.²³⁷ Thus, because the pediatrician in *Atkins* only testified that her findings were consistent

226. *Id.* at 454, 349 S.E.2d at 687 (Smith, J., dissenting).

227. 256 Ga. at 853, 353 S.E.2d at 807-08.

228. *Id.*

229. 243 Ga. App. 489, 533 S.E.2d 152 (2000).

230. *Id.* at 490, 533 S.E.2d at 154.

231. *Id.* at 492-94, 533 S.E.2d at 156.

232. *Id.* at 492-93, 533 S.E.2d at 155.

233. *Id.* at 493, 533 S.E.2d at 156.

234. *Id.* at 495, 533 S.E.2d at 156.

235. 261 Ga. 386, 405 S.E.2d 482 (1991).

236. *Id.* at 387, 405 S.E.2d at 483.

237. 243 Ga. App. at 492, 533 S.E.2d at 156.

with an act of abuse, the admission of her testimony was not an error.²³⁸

Thus, the *Butler-Allison* debate seemed to have concluded by drawing a line between testimony that a child was molested and testimony that a child's symptoms are consistent with molestation.

During the current survey period, this issue arose in several cases. In *Ogle v. State*,²³⁹ the court of appeals held that an expert in "forensic interviewing" was properly allowed to testify that a victim's "interview as a whole was consistent . . . with sexual abuse."²⁴⁰

In *Morris v. State*,²⁴¹ the defendant argued that a psychotherapist improperly bolstered the credibility of a victim by testifying that there was nothing in the demeanor of the victim that would "rule out abuse."²⁴² The court of appeals disagreed, noting that the psychotherapist did not directly comment on the veracity of the victim, and she did not testify that she personally believed that the victim had been sexually abused.²⁴³

Relying on the *Butler-Allison* line of cases, the court in *Morris* reasoned that

there is a world of legal difference between expert testimony that "in my opinion the victim's psychological exam was consistent with sexual abuse," and expert testimony that "in my opinion the victim was sexually abused." In the first situation, the expert leaves the ultimate issues [and] conclusion for the jury to decide; in the second, the weight of the expert was put behind the factual conclusion which invades the province of the jury by providing a direct answer to the ultimate issue: was the victim sexually abused?²⁴⁴

VII. HEARSAY

A. *Necessity Exception*

As discussed in many prior surveys, the rapid expansion of the necessity exception, to exaggerate only a bit, seemed on the verge of supplanting live testimony entirely. Last year's survey pondered the

238. *Id.* at 496, 533 S.E.2d at 157.

239. 270 Ga. App. 248, 606 S.E.2d 303 (2004).

240. *Id.* at 249, 606 S.E.2d at 305.

241. 268 Ga. App. 325, 601 S.E.2d 804 (2004).

242. *Id.* at 327, 601 S.E.2d at 807.

243. *Id.* at 328, 601 S.E.2d at 807.

244. *Id.* at 327-28, 601 S.E.2d at 807 (quoting *Brownlow v. State*, 248 Ga. App. 366, 368, 544 S.E.2d 472, 474 (2001)).

potential impact of the United States Supreme Court's decision in *Crawford v. Washington*²⁴⁵ on Georgia's nearly limitless necessity exception to the hearsay rule.²⁴⁶

In *Crawford* the defendant contended that the trial court improperly allowed the jury to hear his wife's tape-recorded statement to police officers, which the prosecution tendered after his wife invoked her spousal privilege, and thus, was unavailable to testify.²⁴⁷ The trial court and the Washington Supreme Court held that the circumstances of the statement were sufficiently reliable to overcome the defendant's argument that the admission of the out-of-court statement violated his Sixth Amendment²⁴⁸ right of confrontation.²⁴⁹ Prosecutors argued that since the supreme court's decision in *Ohio v. Roberts*,²⁵⁰ courts have increasingly allowed the admission of hearsay statements if the statements fell within a "firmly rooted hearsay exception" or if they bore "particularized guarantees of trustworthiness."²⁵¹ It was the latter language—"particularized guarantees of trustworthiness"—that courts across the country interpreted as a green light to admit hearsay testimony. In Georgia, this bypass around the Sixth Amendment came to be known as the necessity exception to the hearsay rule.²⁵²

The United States Supreme Court granted certiorari in *Crawford* and took aim at *Roberts*. The Court concluded that the Sixth Amendment's right of confrontation was not limited to in-court testimony, but rather also applied to out-of-court "testimonial" statements.²⁵³ Testimonial statements included affidavits, custodial examinations, prior testimony, and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially."²⁵⁴

While the Court did not define with any great precision what is and what is not a testimonial statement, it made clear that interrogations by law enforcement officers are, without a doubt, testimonial in nature.²⁵⁵ Thus, the Court held that the Constitution bars the admission of out-of-court testimonial statements of a witness unless that witness is

245. 541 U.S. 36 (2004).

246. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235 (2004).

247. 541 U.S. at 38.

248. U.S. CONST. amend. VI.

249. *Crawford*, 541 U.S. at 38.

250. 448 U.S. 56 (1980).

251. *Crawford*, 541 U.S. at 57 (quoting *Roberts*, 448 U.S. at 66).

252. See Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 335 (1996).

253. *Crawford*, 541 U.S. at 51, 68.

254. *Id.* at 51.

255. *Id.* at 68.

unavailable to testify and the defendant had a prior opportunity for cross-examination.²⁵⁶

Not surprisingly, and as discussed in last year's survey,²⁵⁷ Georgia courts quickly focused on what constitutes a "testimonial" statement. That was again the focus during the current survey year. In several cases, the Georgia Supreme Court had no choice but to rule that trial courts erred in the admission of hearsay statements under the necessity exception. The problem, at least from the standpoint of the defendants, lay in finding sufficient error to warrant reversal. For example, the supreme court concluded that trial courts erred when they admitted the testimony of a police officer recounting a statement made to him by a victim²⁵⁸ and also in admitting the testimony of a GBI agent regarding a statement made to the agent by a victim's father.²⁵⁹ In both cases, however, the error was harmless.²⁶⁰

In *Jenkins v. State*,²⁶¹ the supreme court had an unusual opportunity to address the admissibility of evidence under the necessity exception prior to trial.²⁶² In *Jenkins* the defendant appealed the trial court's determination that the murder charges against him were not barred by the statute of limitations.²⁶³ The supreme court also addressed the defendant's contention that police officers should not be allowed to testify about statements allegedly made by the defendant's deceased uncle.²⁶⁴ The court easily concluded that *Crawford* barred the admission of the statements: "Arthur Jenkins's statements to the police were testimonial because they were the product of questioning by police officers investigating the murder of Doyle Butler."²⁶⁵ Because the defendant never had the opportunity to cross-examine his uncle about what he allegedly told police, his uncle's statements could not be used against him.²⁶⁶

Of course, not all out-of-court statements are testimonial. In *Shelton v. State*,²⁶⁷ the court held that statements admissible pursuant to the co-conspirator exception to the hearsay rule are still admissible under

256. *Id.*

257. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 248 (2004).

258. *Henry v. State*, 278 Ga. 554, 557, 604 S.E.2d 469, 472 (2004).

259. *Gay v. State*, 279 Ga. 180, 181-82, 611 S.E.2d 31, 33-34 (2005).

260. *Henry*, 278 Ga. at 557, 604 S.E.2d at 472; *Gay*, 279 Ga. at 182, 611 S.E.2d at 33; *see also* *Brown v. State*, 278 Ga. 810, 811, 607 S.E.2d 579, 581 (2005).

261. 278 Ga. 598, 604 S.E.2d 789 (2004).

262. *Id.* at 598, 604 S.E.2d at 790.

263. *Id.*

264. *Id.* at 598-99, 604 S.E.2d at 791.

265. *Id.* at 606, 604 S.E.2d at 795.

266. *Id.*, 604 S.E.2d at 796.

267. 279 Ga. 161, 611 S.E.2d 11 (2005).

Crawford so long as they are not testimonial in nature.²⁶⁸ Thus, according to *Shelton*, a statement made by a co-conspirator to a friend during the concealment phase of a conspiracy is not a testimonial statement.²⁶⁹

Perhaps to no one's surprise, the resilient res gestae exception to the hearsay rule appears to be holding up well since *Crawford*. The res gestae exception, as Judge Ruffin put it, is the "grand octopus of the law, which stretches its clinging tentacles to anything and everything a party says during the commission of an act, or so near thereto [and] has been both a reliable and unreliable exception to the hearsay rule."²⁷⁰ Last year's survey posed the question of whether Georgia courts would narrow the broad res gestae exception as a result of *Crawford*,²⁷¹ a question that the court of appeals, at least, found easy to answer. In *White v. State*,²⁷² the court of appeals held that a trial court properly admitted, pursuant to the res gestae doctrine, a written statement given by an alleged victim to police approximately thirty minutes after the police were dispatched to the scene.²⁷³ This statement, it would seem, clearly met the United States Supreme Court's definition of testimonial hearsay.²⁷⁴

In *Roby v. State*,²⁷⁵ the court held that the trial court properly admitted a police officer's testimony about a statement made to him by a person present when the defendant allegedly obstructed police officers.²⁷⁶ Although the statement was made to police, that did not make it testimonial for purposes of *Crawford*. The statement was not made for the purpose of establishing a fact in a police investigation,²⁷⁷ but rather, the witness "made his spontaneous statement almost immediately after the [the defendant's] obstructing conduct, during [the defendant's] arrest, and without any questioning, prompting, or investigating by the police."²⁷⁸

In *Pitts v. State*,²⁷⁹ another panel of the court of appeals was not so quick to conclude that statements made to police officers were part of the

268. *Id.* at 163, 611 S.E.2d at 14.

269. *Id.*; see also *Womack v. State*, 273 Ga. App. 300, 614 S.E.2d 909 (2005).

270. *White v. State*, 265 Ga. App. 117, 117, 592 S.E.2d 905, 906 (2004).

271. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 251 (2004).

272. 265 Ga. App. 117, 592 S.E.2d 905 (2004).

273. *Id.* at 118-19, 592 S.E.2d at 906-07.

274. *Id.*

275. 273 Ga. App. 308, 614 S.E.2d 916 (2005).

276. *Id.* at 308-10, 614 S.E.2d at 917-18.

277. *Id.* at 310, 614 S.E.2d at 918.

278. *Id.*

279. 272 Ga. App. 182, 612 S.E.2d 1 (2005).

res gestae. In *Pitts* the defendant's wife made statements to police after they arrived at the marital home and allegedly found the defendant assaulting his wife. Invoking her marital privilege, the wife refused to testify at the defendant's trial.²⁸⁰ The court of appeals held that the wife's statements made to police at the scene were testimonial in nature, and thus, inadmissible pursuant to *Crawford*.²⁸¹ However, tape recordings of the wife's statements made to a 911 operator were not testimonial and were admissible as part of the res gestae.²⁸²

In *Crawford* the United States Supreme Court seemed to exclude dying declarations from its holding—or at least so thought the Georgia Supreme Court. In *Walton v. State*,²⁸³ the Georgia Supreme Court noted that the United States Supreme Court,

in its historical analysis, acknowledged that admission of a dying declaration was an exception to the general rule that a prior opportunity to cross-examine was a necessary condition for admissibility of testimonial statements. In fact, the [United States Supreme] Court[] went on to state that “[t]he one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.”²⁸⁴

Thus, according to the Georgia Supreme Court, a dying declaration, even though testimonial in nature, is nonetheless admissible.²⁸⁵

B. Business Records Exception

As discussed in previous surveys,²⁸⁶ Georgia's business records exception²⁸⁷ does not permit the admission of opinions or diagnoses contained in medical records.²⁸⁸ In *Stewart v. CSX Transportation, Inc.*,²⁸⁹ the plaintiff contended that the trial court erroneously admitted, pursuant to the business records exception, evidence that periodic

280. *Id.* at 184, 612 S.E.2d at 3.

281. *Id.* at 186, 612 S.E.2d at 5.

282. *Id.* at 187, 612 S.E.2d at 5. The court said that the statements made to the plaintiff could also be excited utterances. *Id.*

283. 278 Ga. 432, 603 S.E.2d 263 (2004).

284. *Id.* at 434-35, 603 S.E.2d at 265-66 (quoting *Crawford*, 541 U.S. at 56).

285. *See id.* at 432, 603 S.E.2d 263.

286. *See, e.g.*, Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 149, 167 (1997).

287. O.C.G.A. § 24-3-14 (1995).

288. *Id.* In this regard, Georgia's hearsay exception for business records is narrower than the business records exception and the federal rules of evidence, which allows the admission of business records containing opinions or diagnoses. FED. R. EVID. 803(6).

289. 268 Ga. App. 434, 602 S.E.2d 665 (2004).

sampling for asbestos fibers in the plaintiff's workplace showed that asbestos levels were below a level that could have caused asbestosis. The plaintiff did not dispute that the proper foundation had been laid for the admission of the evidence pursuant to the business records exception. Instead, the plaintiff contended that evidence of the fiber count constituted opinion evidence.²⁹⁰ The court of appeals disagreed and reasoned that determining the number of fibers in a sample was not a product of "skill of observation or judgment."²⁹¹ Rather, "the fiber counts were obtained by a routine procedure involving a simple counting of fibers observable under a microscope."²⁹² Thus, the evidence was not a matter of opinion.²⁹³

Interestingly, the court added that because the sampling was done by an independent laboratory, there was no reason to suspect that the reliability of the fiber counts was affected by bias or self-interest.²⁹⁴ Presumably, the court did not mean to suggest that opinions of third-parties in business records are more likely admissible than the opinions of the parties in business records. Indeed, the court's opinion reinforces the blanket prohibition against the admission of opinions or diagnoses pursuant to the business records exception. Presumably, the fact that a record is the business record of a third-party should make a difference in the admission of business records. Indeed, records admitted pursuant to the business records exception are almost invariably records of non-parties.

C. Child Hearsay Statute

The child hearsay statute,²⁹⁵ which provides for the admission of out-of-court statements made by children in sexual abuse cases, became effective in 1986. In previous surveys,²⁹⁶ the author has discussed the numerous appellate decisions interpreting and, to be frank, judicially legislating the statute. These appellate decisions have taken the statute to its present workable form, and there have been few decisions of significance in recent years interpreting the statute. Even when prosecutors overreach and the trial court erroneously admits child

290. *Id.* at 436, 602 S.E.2d at 666.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. O.C.G.A. § 24-3-16 (1995).

296. *See, e.g.*, Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 338-39 (2002); Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 295, 313 (2001); Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 279, 302-04 (1999).

hearsay, that error, as in most criminal appeals, is generally found to be harmless in view of the defendant's overwhelming guilt. During the survey year, however, the court of appeals reversed trial courts twice for the prejudicial admission of child hearsay.²⁹⁷

The availability of a child to testify is the most basic element of the child hearsay statute. Thus, in many cases, the competency of the child to testify is often in dispute.²⁹⁸ If the child is competent, it is rare that the defendant will actually force the child to testify. No defense lawyer would relish the idea of cross-examining, in front of a jury, a child who has been sexually abused. In juvenile court, however, there is no jury. In *In the Interest of B.W.*,²⁹⁹ the mother in a child deprivation case sought to cross-examine her child about allegations that she had been molested by her mother's boyfriend. The juvenile court judge, no doubt concerned about subjecting the child to cross-examination, refused to allow the child to testify even though the child's statements had been previously admitted pursuant to the child hearsay statute. The juvenile court then awarded custody of the child to the Department of Family and Children Services. On appeal, even the state agreed that the child's unavailability for cross-examination rendered her out-of-court statements inadmissible and of no probative value.³⁰⁰ Accordingly, the court of appeals reversed the trial court.³⁰¹

Before admitting child hearsay, the trial court must determine that the child's out-of-court statements are sufficiently reliable.³⁰² The case of *Gregg v. State*³⁰³ sets forth various factors that the trial court should consider in this regard.³⁰⁴ The court should consider the atmosphere and circumstances surrounding the statement, the spontaneity of the statement, the child's physical and emotional condition, whether the child's statement may have been influenced by threats or promises, and various other factors.³⁰⁵ The court of appeals decision in *Ferreri v. State*³⁰⁶ demonstrates that trial courts should take *Gregg* determinations seriously.

297. See *In the Interest of B.W.*, 268 Ga. App. 862, 602 S.E.2d 869 (2004); *Ferreri v. State*, 267 Ga. App. 811, 600 S.E.2d 793 (2004).

298. See, e.g., *Thomas v. State*, 266 Ga. App. 870, 598 S.E.2d 541 (2004).

299. 268 Ga. App. 862, 602 S.E.2d 869 (2004).

300. *Id.* at 863, 602 S.E.2d at 871.

301. *Id.*

302. See *id.*, 602 S.E.2d 869; *Gregg v. State*, 201 Ga. App. 238, 411 S.E.2d 65 (1991).

303. 201 Ga. App. 238, 411 S.E.2d 65 (1991).

304. *Id.* at 240-42, 411 S.E.2d at 68.

305. *Id.*

306. 267 Ga. App. 811, 600 S.E.2d 793 (2004).

In *Ferreri* the defendant appealed his conviction of child molestation, contending that the trial court erroneously admitted seventy-five out-of-court statements by the defendant's daughter, the alleged victim. The acts of molestation allegedly occurred when the child was between the ages of one-and-a-half and three-and-a-half years old. There was no physical evidence of abuse, and the evidence against the defendant consisted almost entirely of statements allegedly made by the victim to others.³⁰⁷ The charges arose in the context of an acrimonious divorce, and the mother arguably had some motive to improperly assist the child in her "recollection" of events. Some of the statements were made to a law enforcement officer conducting his first interview of the alleged victim. In some statements, the child initially, and repeatedly, denied abuse and changed her story only after persistent questioning. Some statements were obtained while the child was only three years old. In some statements, the child repeatedly said that she was tired and asked for the interview to stop, to no avail. In some instances, rewards were given in response to statements incriminating the defendant. In one statement, the child spontaneously accused the defendant immediately after being taken to the bathroom by her mother during a break in the interview. Even the interviewer acknowledged that he was concerned about the circumstances surrounding that incriminating statement.³⁰⁸

The trial court, when denying the defendant's motion for a new trial, even acknowledged that at least two of the statements should not have been admitted.³⁰⁹ After recounting the circumstances surrounding the statements, the court of appeals needed no lengthy decision to reverse the defendant's conviction:

Given the evidence of tender age, inconsistent statements, coaching, involvement of law enforcement, the sheer number of statements introduced by the State, and the fact that the child hearsay statements formed the bulk of the evidence against Ferreri, a pretrial *Gregg* hearing was necessary to prevent the harm that did, in fact, occur in this case.³¹⁰

VIII. MISCELLANEOUS

In *Watson v. State*,³¹¹ the Georgia Supreme Court returned to an issue it had not addressed in almost two decades—the admissibility of

307. *Id.* at 812, 600 S.E.2d at 794.

308. *Id.* at 813-14, 600 S.E.2d at 794-95.

309. *Id.* at 812, 600 S.E.2d at 794.

310. *Id.* at 815, 600 S.E.2d at 795.

311. 278 Ga. 763, 604 S.E.2d 804 (2004).

testimony allegedly influenced by hypnosis. In *Watson* the defendant contended that the trial court improperly admitted the testimony of a witness whose recollection of events had been tainted by hypnosis.³¹² The supreme court reaffirmed its holdings in *Bobo v. State*³¹³ and *Walraven v. State*³¹⁴ concerning the effect of hypnosis on the admissibility of testimony.³¹⁵ First, statements made while in a hypnotic trance are inadmissible.³¹⁶ However, the fact that a witness has been hypnotized does not necessarily render the witness's testimony inadmissible.³¹⁷ Instead, the witness's testimony is

“considered frozen, for the purposes of the party subjecting the witness to hypnosis, as of the date of the hypnosis. That witness subsequently, may only testify, for the party subjecting the witness to hypnosis, as to the specific content of recorded statements that he has made prior to hypnosis, or as to events occurring after the hypnosis session.”³¹⁸

In *Watson* the witness's posthypnotic statements did not conflict with her prior statements to police, but the latter statements provided more detail. Accordingly, the trial court properly limited the witness's testimony to her prehypnotic statements.³¹⁹ While the defendant complained that the recording of the hypnotic session had been “lost,” the court held that that did not render the witness's testimony entirely inadmissible.³²⁰ Again, so long as the witness's testimony is limited to statements recorded prior to hypnosis, the witness's testimony as to those statements is admissible.³²¹ The question, it would seem, is why police hypnotize a witness to begin with.

312. *Id.* at 772, 604 S.E.2d at 813.

313. 254 Ga. 146, 327 S.E.2d 208 (1985).

314. 255 Ga. 276, 336 S.E.2d 798 (1985).

315. *Watson*, 278 Ga. at 772-74, 604 S.E.2d at 813-14.

316. *Id.* at 772, 604 S.E.2d at 813.

317. *Id.* at 773, 604 S.E.2d at 813.

318. *Id.* (quoting *Walraven*, 255 Ga. at 280-282, 336 S.E.2d at 801-03).

319. *Id.*, 604 S.E.2d at 814.

320. *Id.*

321. *Id.*